No. 93-1869

Supreme Court, U.S.
FILED
JUL 22 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JENNINGS WATER, INC.,
Petitioner,

v.

CSL UTILITIES, INC. and CSL COMMUNITY ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

CSL Utilities, Inc. Reply Brief is non-responsive to Jennings Water, Inc.'s argument that a Writ of Certiorari should be granted to address the important Federal Government interests implicit in 7 U.S.C. § 1926(b) which were ignored by the Court of Appeals. Respondent's brief simply reargues the merits of the case instead of responding to petitioner's arguments which identify substantial interests of the Federal Government which were not considered by the Court of Appeals. CSL Utilities, Inc. improperly raises issues decided previously by two Courts of Appeals and two District Courts, makes factual assertions unsupported by the record and cites cases which

have no relevance to Jennings Water, Inc.'s argument in support of the grant of a Petition for Writ of Certiorari.

I. RESPONDENTS IMPROPERLY CHALLENGE THE "SERVICE AREA" DETERMINATION OF THE COURT OF APPEALS WITHOUT FILING A CROSS-PETITION FOR CERTIORARI.

Respondents improperly challenge the conclusion of the Court of Appeals that Country Squire Lakes is within Jennings Water, Inc. ("Jennings") service area. This issue has been decided against the respondents in all prior litigation between these parties. *See Jennings Water, Inc. v. CSL Utilities, Inc. and CSL Community Association, Inc.*, 16 F.3d 130, 133 (7th Cir. 1993); *Jennings Water, Inc. v. City of North Vernon*, 682 F.Supp. 421, 424 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311, 318 (7th Cir. 1989); *CSL Utilities, Inc. v. Jennings Water, Inc.*, 807 F.Supp. 490, 492 (S.D. Ind. 1992). *All* the courts that have addressed this issue between *these* parties since 1988 have consistently held that CSL is a wholesale customer of Jennings and that Country Squire Lakes is within Jennings' service area. CSL's improper argument to the contrary should be rejected because it violates a fundamental rule of Supreme Court practice and procedure. "If a respondent wishes to overturn portions of the judgment which are unfavorable to him, he must file a separate petition for certiorari. This must satisfy all the requirements for any petition for certiorari." *See Robert L. Stern, Eugene Gressman, and Supreme Court Practice*, § 6.35 (6th Ed. 1986). CSL's failure to file a cross-petition on the finding of the Court of Appeals renders such argument as improper.

Likewise, CSL objects to the Court of Appeals decision in favor of Jennings finding that CSL violated two (2) of the three (3) components of the private franchise prohibition of 7 U.S.C. § 1926(b). Those were:

1. That CSL's actions will curtail Jennings' service area. 16 F.3d at 133-134; App. 5(a).

2. CSL was granted a private franchise during the term of the Jennings' loan from the FmHA. 16 F.3d at 134; App. 7(a).

These issues are foreclosed from argument or appeal by CSL. *See Stern, supra,* at § 6.35.

II. RESPONDENTS' RELIANCE UPON *WATSON RURAL WATER COMPANY, INC. v. INDIANA CITIES WATER CORP.*, 540 N.E.2d 131 (Ind.App. 1989) IS MISPLACED.

CSL's persistence in arguing that Country Squire Lakes was not within Jennings service area renders much of its brief irrelevant. For example, CSL relies almost exclusively on one intermediate Indiana appellate opinion, *Watson Rural Water Co., Inc. v. Indiana Cities Water Corp.*, 540 N.E.2d 131 (Ind.App. 1989) for the proposition that 7 U.S.C. § 1926(b) does not protect Jennings' right to serve CSL. However, the case deals with the facts as CSL wishes they were, not as the two appellate court and two district court decisions in this litigation found them to be.

CSL cites the opinion of *Watson* for the proposition that 7 U.S.C. § 1926(b) does not protect a FmHA indebted water association that attempts to "carve itself out a new service area". Respondents' Brief in Opposition, p. 8. *Watson* primarily addressed the *administrative res judicata* effect of *previous* IURC ruling against *Watson* on the service area question. *Id.* at 136. Having failed to appeal the IURC administrative ruling, the Indiana Court of Appeals held: "Therefore, Watson was estopped from claiming in a subsequent court proceeding that the Commission was without jurisdiction." *Id.* 137.

In addition, whereas this case deals with a utility activity clearly within the scope of 7 U.S.C. § 1926(b) and the protection of a pre-existing service area, *Watson* dealt with an activity outside of the scope of the statute. In contrast to the facts of *Watson,* Jennings is not trying

"use the *protective shield* provided by 7 U.S.C. § 1926 (b) as a sword to cut out a new market for its services." 540 N.E.2d 131 at 137 (emphasis added).

Never has there been such a finding between the two parties herein. In fact, just the opposite. Every court of law that has addressed the issue has determined that CSL was part of the Jennings service area. *Watson* is of no help to the respondents.

III. RESPONDENTS' ASSERTION THAT PETITIONER HAS WAIVED ITS RIGHT TO CONTEST THE COURT OF APPEALS CONCLUSION THAT THERE WAS NO GRANT OF A PRIVATE FRANCHISE MISUNDERSTANDS THE FUNCTION OF A PETITION FOR A WRIT OF CERTIORARI.

Respondents' misunderstanding of the office of the Writ of Certiorari petition is reflected by its surprising argument that Jennings has waived its right to argue the merits of the case. This argument lacks any merit because a Petition for a Writ of Certiorari is different from a Supreme Court brief on the merits.

Respondents state correctly that the Court of Appeals held that the issuance of construction permits by Indiana agencies did not constitute the granting of private franchise. Respondents then go on to assert that "Jennings fails to contest this finding in its Petition. . . ." Brief in Opp., p. 9.

This assertion is simply wrong as a matter of Supreme Court practice and procedure. It fails to grasp the difference between the argument required in a petition for writ of certiorari and a brief on its merits. Jennings correctly observed this distinction in its Petition for a Writ of Certiorari. Jennings' Petition for Writ of Certiorari argues that the determination of whether CSL has a right to stop purchasing water from Jennings so it can develop its own supply involves important federal issues not considered by the Court of Appeals. In its Brief on the Merits, Jennings

will argue that the Court of Appeals incorrectly constructed the statutory term "granting of any private franchise" to allow CSL to compete with Jennings. The Petition for Writ of Certiorari correctly concentrated on the federal interests relevant to the construction of this term rather than a full presentation of the technical merits of petitioner's argument. In short, no argument on its merits has been waived.

IV. RESPONDENTS HAVE INCORRECTLY CHARACTERIZED THE STATUTE AT ISSUE, 7 U.S.C. § 1926, AS UNAMBIGUOUS.

CSL's characterization of the statute as unambiguous finds no support in the language of the statute or in the opinion of the Court of Appeals. The Court of Appeals noted that the application of the statute to prevent CSL from providing its own water supply "presents close and difficult problems." 16 F.3d at 133; App. 4a. The Court of Appeals recognized that the statute was ambiguous and construed the term franchise by applying familiar canons of statutory construction. The Court of Appeals first turned to the words of the statute and noted that "the term 'franchise' is not amenable to precise definition." 16 F.3d at 135; App. 8a. It then constructed the statute by reading the statute as a whole in the context of "[t]he cases and fragments of legislative history" and accepted theories of public utility law. 16 F.3d at 135; App. 9a. Petitioner, of course, disagrees with the Court of Appeals' decision on the merits but not with its method of statutory construction.

Respondents' argument appears to turn on a single statement by the Court of Appeals at the end of its analysis of the meaning of the term "franchise." To bolster its construction of the statute based on language, legislative history and prior cases interpreting it, the Court of Appeals observed that: "No doubt the statute is intended to be broadly protectionist, but there are degrees of protec-

tionism which its plain language does not reach." 16 F.3d at 137; App. 12a. The Court of Appeals did not apply the "plain meaning rule" as set out in cases such as *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. ——, 112 S.Ct. 2589 (1992) because 7 U.S.C. § 1926(b) is couched in general language and Congress made no effort to anticipate in detail the entire range of situations in which a FmHA-indebted rural water association is entitled to Congressionally mandated protection from competition. There is no need to belabor this point since respondent's Brief in Opposition ultimately abandons reliance on the plain meaning rule. It argues that the Court of Appeals' decision is correct because it is the "only reasonable interpretation" based on legislative history and the underlying purpose of the statute. Petitioner disputes the conclusion on the merits, but agrees with the Court of Appeals and respondent that resort to the language of the statute alone, without any inquiry into its context, cannot resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1994